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No. 95-211

In the Supreme Court of the United States

OCTOBER TERM, 1995

MARTIN J. QUINN AND EDWARD C. MCREADY,
PETITIONERS

v.

ROBERT PITOFSKY, CHAIRMAN,
FEDERAL TRADE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the courts below correctly determined that petitioners failed to prove a violation of the Age Discrimination in Employment Act under a disparate treatment theory.

2. Whether the courts below correctly determined that petitioners failed to prove a prima facie case of disparate impact.

3. Whether the courts below correctly determined that the practice challenged by petitioners was supported by a business justification.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is unpublished, but the decision is noted at 50 F.3d 1096 (Table). The opinion of the district court (Pet. App. B1-B19) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 1995. A petition for rehearing was denied on May 11, 1995. Pet. App. C1. A petition for a writ of certiorari was filed on August 4, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners Edward C. McReady and Martin J. Quinn were accountants in the Federal Trade Commission's Bureau of Competition (BC) when the agency faced a $4 million budgetary shortfall. Pet. App. B4-B6. After considering both furloughs and a reduction-in-force (RIF) as a means for dealing with the shortfall, the agency decided to conduct a RIF. *Id.* at B6-B8. It developed a plan that included: (1) obtaining authority to offer employees early-out retirements; (2) conducting the RIF in a manner that would minimize the adverse impact on the agency's law enforcement mission; (3) considering the desired mix of skills and grades in determining which positions to abolish; and (4) minimizing the disruption caused by the RIF. *Id.* at B9-B10.

Pursuant to the FTC's plan, six BC employees accepted early-out retirement. Pet. App. B3. The BC also terminated all five of its temporary employees, and abolished 14 permanent positions. *Id.* at B10-B11. Five of the positions abolished were accountant positions. *Ibid.* Noting that there was a significant overlap between the responsibilities of economists and accountants, the BC determined that three accountants could do the work currently performed by eight. *Ibid.* The BC then decided to retain the three most senior accountants and informed the others, including petitioners Quinn and McReady, that their positions had been abolished. Gov't C.A. Br. 7; Pet. App. B11-B12.

2. Petitioners filed suit in federal district court alleging, *inter alia*, that they were discharged on the basis of age in violation of the Age Discrimination in Employment Act, 29 U.S.C. 633a *et seq.* Pet. App. B1.

Following a trial, the district court concluded that petitioners had failed to prove a violation of the ADEA. The court first rejected petitioners' disparate treatment claim, finding that the agency had produced evidence that age was not a determining factor in the employment decisions affecting petitioners and that petitioners had failed to demonstrate that the agency's justifications were a pretext for age discrimination. Pet. App. B14-B15. The court specifically found that the FTC "conducted the RIF because it was faced with a shortage of funds," and that it chose to abolish five accountant positions "because of a determination that the work of the accountants duplicated the work of economists and because there was a disproportionate number of accountants compared to attorneys." *Ibid.*

The court then rejected petitioners' disparate impact claim on the ground that petitioners had failed to prove a prima facie case of disparate impact. Pet. App. B17-B18. The court noted that petitioners' statistics demonstrated a statistically significant disparate impact. *Id.* at B17. It found, however, that petitioners' statistics were unreliable because they excluded Senior Executive Service (SES) employees and ignored the agency's decisions to separate the temporary employees and to offer early-out retirements. *Ibid.* Those two decisions, the court found, "were directly attributable to the budget shortfall and their impact should be considered in the statistical analysis." *Ibid.* Once those employees were included in the sample, no showing of disparate impact could be made. *Ibid.*

The court then found that, even if petitioners had established a prima facie case of disparate impact, they could not prevail, because the agency had

established a business necessity for its actions. Pet. App. B18. The court found that the agency faced a substantial budget shortfall, and petitioners had failed to show that there was an alternative other than a RIF that would have adequately addressed that shortfall. *Ibid.*

3. In an unpublished opinion, the court of appeals affirmed "[f]or the reasons stated in the opinion of the District Court." Pet. App. A1.

ARGUMENT

1. Petitioners contend that the courts below erred in failing to find that Quinn was subjected to dissimilar treatment on the basis of his age. Pet. 5-11, 20-21. That contention is without merit.

Under this Court's decision in *Hazen Paper Co.* v. *Biggins*, 113 S. Ct. 1701, 1705 (1993), "there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age." In this case, each of the decisions that led to Quinn's discharge was motivated by a factor other than Quinn's age. The agency conducted a RIF because it was faced with a budget shortfall. Pet. App. B14. The BC chose to abolish five accountant positions during that RIF because it determined that the work of accountants duplicated the work of economists and that three accountants could perform the work of eight. *Id.* at B11-B12, B14-B15. Quinn was one of the five accountants released because he held a lower grade than the accountants who were retained. Gov't C.A. Br. 7. The courts below therefore correctly concluded that Quinn failed to prove a disparate treatment claim.

Petitioners contend that, because the only reason the agency was able to save money by discharging

Quinn was that he was eligible for a pension, and because his pension eligibility depended in part on his age, the decision to discharge him was based on age. Pet. 5-11, 20-21. The flaw in that argument is that it ignores the district court's finding that the agency did not abolish Quinn's position because his pension eligibility permitted the agency to save money. Pet. App. B15. As the district court explained, while the agency's shortfall was the impetus for the RIF, once the decision to conduct the RIF was made, factors other than savings affected which positions would be abolished. *Id.* at B10-B12. In Quinn's case, those factors were that the BC had more accountants than were necessary to perform the agency's mission and that Quinn was not one of the three most senior accountants. *Id.* at B11-B12, B15; Gov't C.A. Br. 7. Thus, as the district court found, "although the BC knew the retirement status of its employees, the decision to abolish Quinn's position was not based on age." Pet. App. B15.

2. Petitioners' challenge to the district court's finding that they failed to prove a disparate impact violation is also without merit. The district court found that petitioners failed to demonstrate a prima facie case of disparate impact because the statistics on which they relied were unreliable. Pet. App. B17. In particular, the court found that petitioners' statistics improperly excluded SES employees, employees who took early-out retirements, and the temporary employees who were discharged. *Ibid.* Once those employees were included, the court found, the disparate impact disappeared. *Ibid.*

Petitioners contend that it was appropriate to exclude SES, early-out, and temporary employees from their statistical analysis because they limited

their challenge to the agency's "staff imbalance abatement practice" and those employees were not affected by that practice. Pet. 17. The district court determined, however, that the agency's responses to the budget shortfall were best viewed as interrelated components of a single employment practice that affected all employees, rather than as a series of discrete, independent decisions whose effects should be separately analyzed. Pet. App. B17. There is support in the record for that conclusion. For example, the early-out option taken by six employees was available only because the FTC was undergoing a RIF, and had those employees not exercised an early-out option, they would have been vulnerable to the RIF. Gov't C.A. Br. 25. In any event, petitioners' challenge to the district court's finding of no disparate impact raises a fact-specific issue that does not warrant this Court's review.

3. Finally, petitioners challenge (Pet. 18-19, 23) the district court's finding that the FTC established a business necessity for its actions. Because the district court had already concluded that petitioners failed to establish a prima facie case of disparate impact, however, that finding was not necessary to the court's decision. Petitioners' challenge to the district court's finding of a business necessity is therefore not properly presented here.

In any event, there is no merit to petitioners' claim that the FTC failed to establish a business necessity for its actions. Petitioners do not dispute that the FTC established a business necessity for conducting a RIF. They argue, however, that the FTC failed to present any evidence demonstrating a business justification for the manner in which the RIF was conducted. Pet. 18-19, 23. The FTC introduced evi-

dence, however, that it carried out the RIF by eliminating the positions whose elimination would least interfere with its ability to carry out its mission after the RIF. For example, it introduced evidence that it did not reduce secretarial positions because there were already too few secretaries. Pet. App. B10-B11. It introduced evidence that it eliminated three attorney positions because it had too many higher grade attorneys. *Id.* at B11 & n.8. And it introduced evidence that it eliminated five accountant positions because their responsibilities overlapped with those of economists and three accountants could therefore do the work performed by eight. *Id.* at B11. That evidence shows that the agency had a substantial business justification for the manner in which it carried out the RIF.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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